John G. Alamilla, Sr. v. U.S. General Accounting Office

Docket No. 94-01

Date of Decision: March 17, 1995

Cite as: Alamilla v. GAO (3/17/95)

Before: Harriet Davidson, Vice-Chair

Summary Judgment

Merit pay system

Retirement benefits

DECISION ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On March 14, 1994, petitioner, John G. Alamilla, Sr., filed a pro se Petition for Review ("PfR") alleging that the General Accounting Office ("GAO" or "respondent") committed prohibited personnel practices in implementing the pay protection provision of its Evaluator Pay-for-Performance System ("EPFPS"), set forth in GAO Order 2540.1, because he failed to receive the equivalent of a within-grade ("WIG") salary increase on his anniversary date as he would have under the General Schedule ("GS") system.[1] Petitioner claimed that statements by the Comptroller General and other GAO officials, to the effect that he would not be worse off financially under the EPFPS than under the GS system, entitled him to these salary increases. Petitioner alleged that, as a result of the denial of these pay increases, his salary and pension benefits were unlawfully reduced.

As relief, petitioner is requesting that GAO increase his pay equivalent to that of a GS-15, step 10, retroactive to November 23, 1992, which would necessarily augment his pension benefits as well.

On April 4, 1994, respondent filed its answer to the Petition for Review. Respondent denied that petitioner was entitled to any additional money, asserting it had complied with all applicable laws, rules, regulations and GAO orders in implementing pay protection. Respondent maintained that its pay protection provision was a lawful exercise of management discretion.

On July 15, 1994, respondent filed a motion for summary judgment. On August 12, 1994, petitioner submitted his opposition to the motion in which he raised the following new claims: (1) respondent issued GAO Order 2540.1 without notice and an opportunity for public comment

[1] Petitioner initially raised class claims in his Petition for Review. However, he withdrew these claims at the status conference held on April 20, 1994.

in violation of 31 U.S.C. §732(a); (2) respondent lacked the authority under 31 U.S.C. §§731-55 to remove petitioner from the GS system and place him into broad pay bands; and (3) respondent deprived petitioner of his right to a GS level retirement in violation of the due process clause of the United States Constitution.

On September 26, 1994, the Administrative Judge allowed petitioner to amend his petition for review, pursuant to 4 C.F.R. §28.21(a), to include the claims relating to inadequate notice of the regulations governing pay administration under the EPFPS and the lack of authority to establish such a personnel system. On September 27, 1994, the respondent filed its answer, denying petitioner's claims.

On October 12, 1994, the Administrative Judge heard oral argument on respondent's motion for summary judgment. At that time, she granted petitioner's motion for reconsideration and amended the petition to include the due process claim. On October 26, 1994, the parties submitted their post-hearing briefs.

UNCONTROVERTED FACTS

Petitioner was employed by the General Accounting Office ("GAO") for over thirty years until December 31, 1993, when he retired. At the time of his retirement, petitioner was a Band III Supervisory Auditor under GAO's Evaluator Pay-for-Performance System.

Prior to June 16, 1989, evaluators, evaluator-related specialists and attorneys employed by GAO were compensated in accordance with the General Schedule pay system and received within-grade pay increases, when applicable, on their "anniversary dates." Salary increases were generally based upon a time-in-grade formula. On June 15, 1989, petitioner was a Supervisory Accountant, an evaluator-related specialist position, at a GS grade 15, step 8, and most likely would have been entitled to receive a WIG salary increase on November 23, 1989, had he remained under the GS system.

On June 16, 1989, GAO established the Evaluator Pay-for-Performance System, which created a new flexible position classification and merit pay system for the majority of GAO's workforce. Evaluators, evaluator-related specialists and attorneys were removed from the GS pay system and placed in broad pay bands, under EPFPS, based upon their GS grade level as of June 15, 1989.

Prior to its implementation, GAO utilized various means of informing its employees about the upcoming transition to EPFPS. Managers conducted briefing sessions at which salient portions of the new program were discussed with their staffs. Petitioner attended these briefing sessions. (Hearing Transcript ("HT") of October 12, 1994, at 49-51).

On May 16, 1989, the Deputy Assistant Comptroller General for Human Resources distributed a memorandum to all employees, including petitioner, which summarized the new or revised personnel orders implementing EPFPS. The memorandum listed GAO Order 2540.1 with the following description: "pay policy for the evaluator pay for performance system including bonuses." It further directed employees to appropriate human resources personnel for responses

to their questions. (Resp. Ex. 6).

On May 19, 1989, Comptroller General Bowsher issued a memorandum, in which he described the upcoming implementation of the EPFPS. The memorandum set forth the policy behind the pay protection provision of the EPFPS: ". . . we have designed a system to ensure that those who continue to perform fully satisfactorily will not fare worse financially than they would have at their current grade [emphasis added] under the General Schedule. Our 'pay protection' provisions ensure that." (PfR, Attach. 1).

GAO developed regulations for the conversion to bands; the determination of rates of basic pay, merit increases and bonuses; and pay protection. On June 2, 1989, GAO issued Order 2540.1--"Pay Administration in the Evaluator Pay-For-Performance System" as an interim order, effective June 16, 1989. (Resp. Motion for Summary Judgment, Attach. 2). Under the terms of the interim order, on June 16, 1989, covered employees were scheduled to be converted to EPFPS bands, which corresponded to their GS grade on the previous day. However, personnel actions to document these changes were not scheduled to be processed administratively until October 8, 1989. Yearly salary increases and bonuses were to be given to employees contingent upon their performance.

The interim order had two special provisions to ease the financial transition from the GS system to EPFPS. (See Chapters 4 and 5 of GAO Order 2540.1). First, GAO established a one time "buyout" of WIGs (HT at 40). Certain employees, such as the petitioner, who would have been entitled to a WIG after October 8, 1989, were scheduled to receive a prorated increase to their basic pay on October 8, 1989. See GAO Order 2540.1, Chapter 5, Paragraph 2.c(2)(b).

Second, GAO established pay protection for the ensuing years of the EPFPS. Once a year, usually after a merit increase payment, an employee's salary was to be compared with the salary he or she would have received under the GS system.[2] If the salary was lower under EPFPS, it was to be increased to the level of the GS salary. See GAO Order 2540.1, Chapter 4, Paragraph 3. Under the system, those employees who had WIG anniversary dates after the pay protection comparison date would have to wait until the next comparison date to receive their increases.

The interim order was distributed to senior GAO officials (GS-15s and above) in Headquarters and at audit sites, other specified individuals and employee councils, pursuant to the distribution

[2] The interim regulations provided that the pay comparison would be made on October 7, 1990, and on the first day of the first pay period in each subsequent October. Interim GAO Order 2540.1, Chap. 4, Paragraph 2.b. However, the pay comparison date was changed to November 4 for subsequent years when the final regulations were adopted on October 25, 1989. GAO Order 2540.1, Chap. 4, Paragraph 3.b. In March 1994, there was a subsequent change to the first day of the last pay period in December. The dates were changed to correlate with the deadline for the completion of the performance appraisals and the promotion cycle. (HT at 30).

code set forth on the order.[3] Petitioner was a member of the group of GS-15s to whom a copy of the interim order was distributed. The first sentence of the interim order stated:

> This notice transmits and invites written comments [emphasis added] on interim GAO Order 2540.1. It is being issued as an interim order with an effective date of June 16, 1989. This order has, however, been developed on the basis of comments received in numerous briefings and from draft documents distributed to employees to be covered under the Evaluator Pay-for-Performance System.

The second page of the order explained the procedures for submitting written comments. On October 25, 1989, after the comment period had expired, GAO adopted final Order 2540.1.

On October 8, 1989, GAO processed petitioner's conversion from a GS-15 to a Band III Supervisory Auditor. (Resp. Ex.1). Since petitioner had not completed his WIG waiting period as of October 7, 1989, he received a prorated amount of the WIG increase he would have received, calculated up to October 7, 1989 (the WIG "buyout"). See GAO Order 2540.1, Chapter 5. On October 7, 1990, petitioner received a salary increase of $79.00 (the remainder of WIG "buyout", covering the period of time between October 8, 1989, and November 23, 1989) under pay protection.

Although under the GS system petitioner would have been entitled to another WIG pay increase in the amount of $2,141.00 on November 23, 1992,[4] he did not receive the additional salary under pay protection until November 15, 1993. Petitioner retired from GAO on December 31, 1993. Accordingly, his civil service retirement benefits were calculated based upon the average of his three highest annual rates of basic pay ("high three year average"). Petitioner's high three year average occurred when he was under the EPFPS.

ANALYSIS

Respondent has filed a motion for summary judgment in this case. The standards for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Summary judgment should be granted when it is shown "that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). See also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine dispute about a material fact

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[3] See GAO Order 0030.1, which lists the distribution codes that are used to send printed materials to various groups of recipients within GAO. (Resp. Ex. 8).

[4] GAO Order 2531.3, Chapter 2, Section 3, provided that GS employees were entitled to WIG increases every three years between Steps 7, 8, 9 and 10. Had he remained in the GS system, petitioner would have been entitled to move from Step 9 to 10 on November 23, 1992.

arises when "the evidence is such that a reasonable jury [or judge] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, the moving party bears the burden of proving the absence of any material facts in dispute. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In deciding if there are any issues of material fact, the nonmoving party's version of the facts must be accepted, since the trier of fact is required to resolve all issues of fact in favor of the party opposing the motion for summary judgment. *Bishop v. Wood*, 426 U.S. 341 (1976). Applying these legal principles, the Administrative Judge finds that there are no issues of material fact in dispute. The uncontroverted facts in this case have been set out above. The remaining issue is whether or not, based upon these facts, respondent is entitled to judgment as a matter of law.

Petitioner claims that GAO officials committed various prohibited personnel practices in promulgating the regulations governing the EPFPS, removing petitioner from the GS pay system and placing him in pay bands under the EPFPS, implementing the pay protection provision of the EPFPS, and depriving him of his constitutional right to a GS-level retirement annuity in violation of the due process clause of the fourteenth amendment of the United States Constitution.[5] In analyzing these claims, the discussion will begin with the relevant law and its application to each of the alleged prohibited personnel practices.

31 U.S.C. §753(a)(2) gives the Board jurisdiction over personnel practices prohibited under section 732(b)(2) of the General Accounting Office Personnel Act ("GAOPA"). Section 732(b)(2) incorporates the definitions of prohibited personnel practices set forth in 5 U.S.C.§2302(b). Petitioner bases his prohibited personnel practice claims on subsection (b)(11) of 5 U.S.C. §2302, which makes it a prohibited personnel practice to take or fail to take any personnel action if the taking of or failure to take such action violates any law, rule or regulation, implementing or directly concerning the merit system principles contained in 5 U.S.C §2301. In order to prevail, the petitioner must establish by a preponderance of the evidence that GAO's action violated a law, rule or regulation and that the violated law, rule or regulation is one which implements or directly concerns a merit system principle. *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 579 (1993), *aff'd mem.*, 39 F.3d 1196 (Fed. Cir. 1994); *Wells v. Harris*, 1 M.S.P.R. 208, 241 (1979).

A. PROMULGATION OF GAO ORDER 2540.1 WITHOUT PRIOR NOTICE AND OPPORTUNITY FOR PUBLIC COMMENT

Petitioner contends that GAO promulgated Order 2540.1[6] in violation of 31 U.S.C. §732(a), thereby committing a prohibited personnel practice under 31 U.S.C §732(b)(2). Petitioner

[5] Although the fourteenth amendment does not apply to the Federal government, the due process clause of the fifth amendment imposes limitations on Federal agency action. *American Federation of Government Employees, AFL-CIO v. United States*, 622 F. Supp. 1109, 1112 (N.D. Ga. 1984), aff'd, 780 F.2d 720 (Fed. Cir. 1986). Accordingly, petitioner's due process arguments will be considered as arising under the fifth amendment.

[6] GAO Order 2540.1 is a regulation subject to the provisions of Section 732(a).

asserts that 31 U.S.C. §732(a) required GAO to publish interim Order 2540.1 in the Federal Register and to invite comments from members of the general public prior to its final adoption. (HT at 45-49). He claims that the agency's failure to do so renders the regulation void.

GAO argues that the notice and comment provision of the statute does not mandate publication of GAO's personnel regulations in the Federal Register, but gives the Comptroller General discretion in determining the method of providing notice to GAO employees as long as they have the opportunity to provide their views on proposed regulations. Respondent contends that GAO's internal procedures for making interim Order 2540.1 generally available to GAO employees, with distribution to senior staff (GS-15 level and above) and representatives of employee councils, coupled with management briefings and explanatory memoranda, satisfied the statutory requirements.

The threshold issue is whether Section 732(a) of the GAOPA required GAO to publish interim Order 2540.1 in the Federal Register and to solicit comments from members of the general public. The analysis begins with the language of the statute itself. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). 31 U.S.C. §732(a) provides:

> The Comptroller General shall maintain a personnel management system. The Comptroller General may prescribe a regulation about the system only after notice and opportunity for public comment. A reprisal or threat of reprisal may not be made against an officer or employee of the General Accounting Office because of comments on a proposed regulation about the system.

Under the rules of statutory construction, if the intent of Congress is clear from the plain and unambiguous meaning of the statutory language, the tribunal must give effect to the statute as written. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Difford v. Secretary, HHS*, 910 F.2d 1316, 1318 (6th Cir. 1990). Where the statutory language is ambiguous, that is, capable of being understood by reasonably well-informed persons in more than one manner, a review of the legislative history provides useful insight into legislative intent. See *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

31 U.S.C. §732(a) is silent as to the meaning of the phrase "notice and opportunity for public comment." Therefore, the intent of Congress cannot be inferred from the statutory language. To ascertain what Congress contemplated by that phrase, a review of the legislative history is an appropriate beginning.

The GAOPA created a personnel management system independent of the regulation and oversight of the Office of Personnel Management ("OPM") and other executive branch agencies. The initial versions of the Act (H.R. 12845, S. 3411 and H.R. 3339),[7] introduced at the request of the Comptroller General, provided a basic framework for a personnel management system at

[7] H.R. 12845 and S. 3411 were introduced in the 95th Congress, 2d Session (1978). H.R. 3339 was introduced in the 96th Congress, 1st Session (1979).

GAO, but left many of the details about the system to be set forth in regulations, which did not require employee input.

At the July 10 and 20, 1979 hearings on H.R. 3339 before the Subcommittee on the Civil Service of the House Committee on Post Office and Civil Service, Subcommittee Chairperson Schroeder expressed her concern that there was no provision in the bill requiring the Comptroller General to consult with employee representative groups before finalizing the regulations. Congresswoman Schroeder asked a representative of GAO's Career Level Council,[8] who testified at the hearings, for his proposals for statutory language that would require the Comptroller General to provide employees and employee organizations with the opportunity to review and comment on all implementing regulations. See Hearings on H.R. 3339, 96th Cong., 1st Sess. 33 (1979).

Subsequent to the hearings, the staff of the Subcommittee, at Chairperson Schroeder's direction, drafted an amended version of H.R. 3339. The amended bill, retitled H.R. 5176, contained Section 3(a) which provided:

> The Comptroller General shall, not later than the effective date set forth in section 9(a), promulgate regulations establishing a personnel management system which shall apply to the General Accounting Office and which shall meet the requirements of subsections (b) through (h) of this section. Before promulgating regulations (or any amendment thereto) under this Section, the Comptroller General shall provide notice and an opportunity for public comment.

96th Cong., 1st Sess. (1979).

Essentially this same language is found in the Senate bill, S. 1879 (96th Cong. 1st Sess.), introduced by Senator Glenn on October 11, 1979, and remained in all versions of the bill, including the one eventually enacted into law on February 4, 1980.[9]

The Committee report accompanying H.R. 5176 explains that "the Committee intends to give

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[8] The Career Level Council was established in 1969 as an advisory group to the Comptroller General and represented professional employees in grades GS-12 and below.

[9] Pub. L. No. 96-191, 94 Stat. 27 (1980) contained a few minor stylistic changes in the language of Section 3(a) to reflect the Senate version of the bill, S. 1879. The GAOPA, including Section 3(a) was subsequently amended by Pub. L. No. 97-258, 96 Stat. 877, 896-902 (Sept. 13, 1982), which substituted "simple language ...for awkward and obsolete terms..." throughout title 31 of the United States Code. No substantive changes were made. H.R. Rep. No. 97-651, 97th Cong. 2d Sess.(1982), 1982 U.S. Code Cong. & Admin. News. 1895. The present Section 732(a) reflects those amendments.

wide discretion to the Comptroller General in designing the personnel system ...however, [it] intends to limit [his] flexibility . . . in certain areas. The Comptroller General is required to establish GAO's personnel system by regulation in advance, so that employees have clear notice of the system's requirements [emphasis added]." In its analysis of Section 3(a) of the bill, the Committee reiterated that one of the reasons for requiring that the regulations implementing the GAOPA be promulgated prior to its effective date is to provide advance notice to employees of changes in conditions of employment that may occur as a result of the implementations of the new personnel system. Further, it is clear from the statutory language that the notice and comment requirements do not only apply to the initial regulations, but also to subsequent amendments.

The legislative history of Section 732(a) of the GAOPA suggests that Congress was primarily concerned about the impact that changes in GAO's personnel system had on employees, and included the notice and comment provisions for employees rather than for members of the general public. There is nothing in the legislative history to reveal a Congressional intent to require the Comptroller General to publish GAO's personnel regulations in the Federal Register, which is generally designed to reach an audience beyond the specific agency.

A review of other similar statutes supports the same conclusion. Section 553 of the Administrative Procedure Act ("APA") specifically exempts personnel matters from its rulemaking requirements, namely advance publication in the Federal Register of the proposed rule or its substance and an opportunity for public comment. 5 U.S.C. §553(a)(2). Accordingly, when Congress enacted 5 U.S.C §103(b)(1) and (2) (as part of the Civil Service Reform Act), which is a comparable statute to §732(a) for executive branch agencies, it expressly required the Director of the Office of Personnel Management ("OPM") to "publish in the Federal Register general notice of any rule or regulation which is proposed by the Office [of Personnel Management] and the application of which does not apply solely to the Office or its employees . . . " [Emphasis added].

Thus, Congress is highly specific as to when OPM is required to publish its regulations in the Federal Register, and when it is not. Publication is not mandated when the regulations have exclusively internal application, as is the present case at GAO.

Congress was aware of the provisions of the APA and the Civil Service Reform Act when it enacted the GAOPA. Publication in the Federal Register is a unique and precise requirement which is not generally included in the ordinary meaning of the word "notice." If Congress intended for the Comptroller General to publish GAO's personnel regulations in the Federal Register, it would have included such a provision in Section 732(a) of the GAOPA. Accordingly, it is determined that GAO was **not** required by statute to publish interim Order 2540.1 in the Federal Register and invite comments from members of the general public.[10]

[10] This ruling should not be interpreted to mean that publication of personnel regulations in the Federal Register would conflict with the statutory requirements. There may be some circumstances where it would be a more appropriate form of notice, especially coupled with an internal notification system.

Because Congress clearly wanted to ensure that employees had notice of significant changes in the terms and conditions of their employment, the next issue is whether GAO took adequate steps to provide the petitioner with notice and an opportunity to comment on interim Order 2540.1. The adequacy of the notice in any case must be determined by a close examination of the agency's conduct which produced the challenged regulation. *American Medical Association v. United States*, 887 F.2d 760, 768 (7th Cir. 1989).

A review of the record discloses many attempts by GAO to inform employees about the significant provisions of the EPFPS prior to the issuance of the proposed regulations implementing the system. GAO managers conducted briefing sessions at which the pay system under EPFPS, including pay protection, was addressed. Petitioner admitted to attending these sessions. (HT at 49). The Deputy Assistant Comptroller General for Human Resources sent a memorandum to all employees, including petitioner, which explained that GAO was in the process of issuing new or revised orders to implement EPFPS, included a summary of interim Order 2540.1, and referred employees to appropriate personnel representatives for answers to questions. (Resp. Ex. 6). The Comptroller General also issued a memorandum to all employees in which he described the general policy behind pay protection. (PfR Attach. 1). The agency newsletter, Management News, which is routinely distributed to all employees, contained articles about the EPFPS in general, specific implementing orders, and procedures for obtaining additional information. See Vol. 16, No. 32, Week of May 29-June 2, 1989. (Resp. Ex. 7). Thus, respondent familiarized petitioner with the general policy behind pay protection and informed him that GAO would be promulgating regulations about pay administration under the EPFPS even prior to the issuance of interim Order 2540.1 on June 2, 1989.

Petitioner, as a GS-15 senior-level employee, was on the agency's distribution list to receive a copy of the entire interim Order, which expressly invited employee comments. There is nothing in the record to indicate that GAO failed to transmit copies of the interim order to the designated distributees. At the oral argument in this case, petitioner was unclear about whether or not he remembered personally receiving a copy of the interim order. However, the evidence of record clearly establishes that petitioner was in the class of employees (GS-15s) to whom a copy of the interim order, with its invitation for comment, was distributed. Therefore, even if petitioner did not personally receive the order, the outcome would be the same.

Based on the foregoing, it is determined that respondent took steps reasonably calculated to provide notice to the petitioner of interim Order 2540.1 and to solicit his comments. Accordingly, petitioner has not established the commission of a prohibited personnel practice.[11]

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[11] It is not necessary to decide whether GAO employees who were not on the distribution list to receive GAO interim Order 2540.1 had sufficient notice and an opportunity to comment on the regulations governing pay administration under EPFPS. It is troubling that GAO chose not to distribute to all employees at the GS-14 level and below copies of the interim order, which would dramatically alter the terms and conditions of their employment. Furthermore, there is no indication that they were apprised of their right to comment on the proposed regulations. However, the present case does not raise this issue as petitioner was a GS-15 who was on the

B. NO AUTHORITY TO PLACE PETITIONER IN A PAY BAND UNDER EPFPS

Petitioner argues that respondent did not have the authority under the GAOPA to remove him from his grade under the General Schedule and place him in a pay band under GAO's EPFPS. Petitioner fails to cite to Section 731(b) of the GAOPA, which specifically gives the Comptroller General the authority to establish for appropriate officers and employees a merit pay system that is consistent with section 5401 of title 5, which was generally applicable to executive branch agencies. 5 U.S.C §5401 provided that a merit pay system should:

> (A) within available funds, recognize and reward quality performance by varying merit pay adjustments;
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> (B) use performance appraisals as the basis for determining merit pay adjustments;
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> (C) within available funds, provide for training to improve objectivity and fairness in the evaluation of performance; and
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> (D) regulate the costs of merit pay by establishing appropriate control techniques.

Even when Congress repealed the executive branch merit pay system, known as the performance management and recognition system (including section 5401 of title 5), effective November 1, 1993, and replaced it with a system of step increases, it amended §731(b) of the GAOPA to read:

> The Comptroller General may establish for appropriate officers and employees a merit pay system consistent with section 5401 of title 5, as in effect on October 31, 1993. [The underlined statutory language reflects the amendment].

See, Performance Management and Recognition System Termination Act, Pub. L. 103-89, 107 Stat. 981 (September 30, 1993). This legislative action makes clear that Congress intended for the Comptroller General to retain his authority to maintain a merit pay system consistent with elements set forth in § 5401, prior to its repeal.[12]

Petitioner claims that the use of the word "grade" in sections 732(c)(3), 732 (c)(5) and 732 (d)(3) of the GAOPA indicates a legislative intent to have all GAO employees remain under the GS system. There is nothing in the Act or its legislative history to support such a conclusion. Furthermore, the provisions cited by petitioner do not conflict with the Comptroller General's authority to establish a merit pay system. Since the petitioner has not demonstrated that the

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agency's distribution list.

[12] Petitioner does not cite to any instances where GAO's EPFPS was defective with respect to the requirements set forth in §5401.

Comptroller General violated any law, rule or regulation implementing or directly concerning a merit system principle in placing the petitioner in a pay band under the EPFPS, this prohibited personnel practice claim must be denied.

C. BREACH OF IMPLIED CONTRACT

Petitioner claims that 31 U.S.C. §§704(a) and 731(b)[13] give the Comptroller General the authority to enter into contracts with employees.[14] Petitioner alleges that the memorandum from the Comptroller General dated May 19, 1989, (PfR Ex. 1) and certain other statements by GAO officials concerning pay protection created an implied contract, guaranteeing the petitioner the same salary he would have received under the GS system. Petitioner contends that by arbitrarily selecting a fixed date for the pay protection adjustment under EPFPS, GAO delayed petitioner's receipt of a pay increase equivalent to that which he would have received under the GS system. Consequently, petitioner argues that GAO breached its contract with petitioner, thereby committing a prohibited personnel practice.

The statutes cited by petitioner do not even mention the authority or ability of the Comptroller General to enter into contracts with his employees. Thus, petitioner has not alleged the violation of any law, rule or regulation, which is a threshold requirement for the establishment of a prohibited personnel practice under subsection (b)(11) of 5 U.S.C. §2302. Accordingly, the Board lacks jurisdiction to entertain this claim.

D. DUE PROCESS CLAIM

Finally, Petitioner argues that GAO deprived him of his right to a GS-level retirement benefit in violation of the due process clause of the United States Constitution. This claim is without merit.

The Constitution guarantees that no person will be deprived of his property without due process of law. The Supreme Court stated in *Board of Regents v. Roth*, 408 US 564, 577 (1972): "To have a [constitutionally protected] property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

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[13] 31 U.S.C. §704(a) states: "To the extent applicable, all laws generally related to administering an agency apply to the Comptroller General." 31 U.S.C. §731(b) states: "The Comptroller General may establish for appropriate officers and employees a merit pay system consistent with section 5401 of title 5, as in effect on October 31, 1993."

[14] Public employment does not give rise to a contractual relationship in the traditional sense. *Shaw v. United States*, 640 F.2d 1254, 1260 (Cl. Ct. 1981); *Urbina v. United States*, 428 F.2d 1280, 1284 (Cl. Ct. 1970). Federal officials may, by their words or actions, create certain expectations in their employees and subsequently disappoint them. However, this conduct, by itself, does not create contract liability on the part of the Federal government. *Shaw, supra*, at 1260.

Entitlement to and the amount of retirement benefits are governed by the provisions of the Civil Service Retirement Act ("CSRA"), 5 U.S.C. §§8331-48. It is the CSRA which serves as the "independent source" that creates and defines cognizable property interests. *American Postal Workers Union v. Unites States Postal Service*, 707 F.2d 548, 554 (D.C. Cir. 1983), *cert. denied* 465 U.S. 1100 (1984). See also, *Board of Regents v. Roth, supra*, 408 U.S. at 577. At the time of his retirement, petitioner only had a property interest in a pension annuity calculated in accordance with the provisions of the Civil Service Retirement Act. *American Postal Workers Union v. United States Postal Service, supra*, 707 F.2d at 554.

Under the Civil Service Retirement Act, the average of an employee's three highest annual rates of basic pay ("high three year average salary") serves as the basis for calculating the employee's retirement benefits. 5 U.S.C. §§8331(4) and 8339. At the time of his retirement, petitioner's three highest salary years occurred when his pay was determined under the EPFPS. Accordingly, the government properly averaged petitioner's salary during this period to compute the amount of his pension.

The petitioner is not claiming that GAO miscalculated the amount of his annuity or that it violated any provision of the Civil Service Retirement Act. Instead, he is asserting that his pension benefit should have been computed by using the basic pay level of a GS-15, with appropriate within-grade increases, and that he has a protected property interest in that level of benefit.

Although the Civil Service Retirement Act bases the annuity of federal employees on their "high three year average salary," it does not specify the amount of salary that must be paid nor require that it be calculated under the GS system. It has already been determined that the Comptroller General had the legal authority to remove petitioner from the GS system and place him under the EPFPS. (See pages 17-18 of this decision). Petitioner does not have any legitimate claim of entitlement to have his basic pay calculated under the GS system. Accordingly, petitioner has not demonstrated a constitutional or statutory right to have his pension based upon a GS salary and, therefore, his due process claim must fail.

CONCLUSION

For the foregoing reasons, the Administrative Judge finds that there is no genuine issue as to any material fact, and respondent is entitled to judgment as a matter of law. Therefore, respondent's motion for summary judgment is **GRANTED**, and petitioner's petition for review is **DISMISSED** with prejudice.

SO ORDERED.